IN THE

Supreme Court of the United States

October Term, 1978

No. 78-187

ENCARNATION T. DAVID and
CLEMENTE D. DAVID,

Petitioners,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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On the Brief

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

EDWARD L. DUBROFF, Counsel to the firm of BARST & MUKAMAL, on behalf of Petitioners, prays that a writ of certiorari, issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on June 28, 1978.

Opinions Below

The opinion of the Board of Immigration Appeals is not officially reported but is dated August 31, 1976 and included in the Appendix on page 2.

The judgment order of the United States Court of Appeals for the Third Circuit, without formal written opinion, is unreported.

Jurisdiction

The judgment order of the Court of Appeals for the Third Circuit was entered on June 28, 1978, and a copy thereof is appended to this petition in the Appendix at p. 1. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

Petitioners applied for relief from deportation under 8 U.S.C. 1251(f) (Section 241(f) of the Immigration and Nationality Act, as amended) on a motion to reopen to the Board of Immigration Appeals. Although an evidentiary hearing was not had on the issue of Petitioners' eligibility for the relief sought, the Board of Immigration Appeals nevertheless denied Petitioners' motion. In so doing the Board reached a legal conclusion contrary to established legal precedent.

The United States Court of Appeals for the Third Circuit affirmed the decision of the Board of Immigration Appeals without rendering an opinion. The questions presented are:

1. Whether the term "otherwise admissible" as contained in 8 U.S.C. 1251(f) has been interpreted by the Board of Immigration Appeals and the Court below in a manner contrary to its meaning and intent.
2. Whether the Board of Immigration Appeals erred in denying Petitioners an evidentiary hearing on the threshhold issue of their eligibility for relief under 8 U.S.C. 1251(f).

3. Whether the Court below, in affirming the decision of the Board of Immigration Appeals apparently disregarded, without reason, their prior decision in *Persaud* v. *INS*, 537 F.2d 776 (3rd Cir. 1976).

Statutes, Federal Rules and Regulations Involved

The pertinent portions of the Immigration and Nationality Act:

1. 8 U.S.C. 1251(f)
2. 8 U.S.C. 1251(a)(1)
3. 8 U.S.C. 1251(a)(2)
4. 8 U.S.C. 1182(a)(14)
5. 8 U.S.C. 1182(a)(19)
6. 8 U.S.C. 1182(a)(20)
7. Section 7 of the Act of 1957
   (P.L. 85-316, 71 Stat. 639)

The foregoing are set forth in the Appendix at pages 5-8.

Statement

On November 25, 1974 an Order to Show Cause was issued by the Respondent against the female petitioner alleging that she had entered the United States at Honolulu, Hawaii, on or about August 26, 1973, at which time she was admitted for permanent residence as an immediate relative under the provisions of Section 201(b) of the Immigration and Nationality Act; that she did not present evidence of the termination of her prior marriage to Clemente David; that the evidence presented of her marriage to Alfred K. Donnelly had been determined to be fraudulent; that Alfred K. Donnelly, as described in petition and ancillary documents, had been determined to

be non-existent; that, therefore, at the time of her entry she was not in possession of a valid, unexpired immigrant visa, border crossing identification card or reentry permit; and that she was not exempt from presentation thereof.

Petitioner was, therefore, charged in said Order to Show Cause with being subject to deportation pursuant to 8 U.S.C. 1251(a)(1) in that, at the time of entry she was excludable under 8 U.S.C. 1182(a)(20), as an alien who was an immigrant not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document, and not exempted from the possession thereof by said act or regulations made thereunder.

The within petitioners are wife and husband, respectively, and the husband's relief is contingent upon such benefits as may accrue to his wife.

A deportation proceeding against both petitioners was commenced on December 19, 1974 before an Immigration Judge in Newark, New Jersey, and was concluded on the same day.

Immediately upon the conclusion of that hearing the Immigration Judge rendered his decision, whereby he found each of the petitioners to be deportable on the charges in the respective Orders to Show Cause, granted their applications to be permitted to voluntarily depart from the United States without expense to the Government in lieu of an order of deportation, directed that they so depart by April 19, 1975, and ordered that each be deported from the United States to the Philippines if there was a failure to so depart. The petitioners did not effectuate voluntary departure.

On September 21, 1976, petitioners' attorneys made a motion for a reopening of deportation proceedings in order

to allow the female petitioner to make an application for a termination of said proceedings pursuant to 8 U.S.C. 1251(f).

On September 29, 1977, the Board of Immigration Appeals denied the motion for a reopening of deportation proceedings which would have allowed the female petitioner to present evidence of eligibility for relief under 8 U.S.C. 1251(f).

A petition for review was filed by petitioners in the United States Court of Appeals for the Third Circuit on October 14, 1977.

The Court denied this petition on June 28, 1978 in a judgment order affirming the decision of the Board of Immigration Appeals.

Petitioners, having never been permitted a full and formal hearing on their request for relief under 8 U.S.C. 1251(f) remain under a final order for deportation which is to be effectuated on July 31, 1978.

Reasons for Granting the Writ

The decision below should be reviewed because its erroneous interpretation of the terms "otherwise admissible" contained in 8 U.S.C. 1251(f) emasculates the clear meaning of this statute and is contrary to the intent of Congress.

Further, the decision below is in conflict with the decisions of this Court in *INS* v. *Errico* and *Scott* v. *INS*, 385 U.S. 214 (1966) or, if it is not in conflict, presents issues of far-reaching importance in the context of applications for relief under 8 U.S.C. 1251(f). These issues, apparently unclear and/or undecided, must eventually be faced. In either event, this Court should grant review.

The terms of 8 U.S.C. 1251(f) provide that where an alien is excludable at time of entry on account of an act of fraud or misrepresentation in procuring an immigrant visa, such alien is forgiven the fraud if the individual is the spouse, parent or child of a U. S. citizen and "otherwise admissible at the time of entry."

The term "otherwise admissible" has been defined by the Fifth Circuit to mean ". . . . that an alien need only the physical, mental and moral standards for admission to this country set out in 8 U.S.C. 1182", *Gonzalez de Moreno* v. *INS*, 492 F.2d 532 (5th Cir. 1974). Similarly, *Gonzalez* v. *INS*, 493 F.2d 461 (5th Cir. 1974); *Castro-Guerrero* v. *INS*, 503 F.2d 964 (5th Cir. 1974); *Ruiz-Salazar* v. *INS*, 505 F.2d 118 (5th Cir. 1974). Such standards do not encompass the labor certification provisions of 8 U.S.C. 1182(a)(14).

The Third Circuit has held in *Persaud* v. *INS*, 537 F.2d 776 (3d Cir. 1976) that the Immigration Service cannot pick and choose the exclusion sections of 8 U.S.C. 1182 with which they will charge the alien in deportation proceedings, in order to thereby avoid the manifest purpose of 8 U.S.C. 1251(f). Nevertheless, the Board of Immigration Appeals, on its own initiative, has introduced an element never before present nor charged in the prior deportation proceeding. The Board concluded that the petitioner herein must show herself to be exempt from an alien employment certification, pursuant to 8 U.S.C. 1182(a)(14), to be found "otherwise admissible".

By so doing, the Board of Immigration Appeals, and the Third Circuit by its silent affirmance of the Board's opinion, have concluded that 8 U.S.C. 1182(a)(14) is an independent ground of exclusion entirely unrelated to the fraud committed by the petitioner.

There is no question that a fraud was committed by the petitioner in procuring an immigrant visa. However,

in a manner straining all logic, the Board seeks to separate the 8 U.S.C. 1182(a)(14) exclusionary grounds from the fraud itself. The false premise contained in this proposition can best be illustrated with reference to the notion of "a lesser included offense." This notion was present in the Third Circuit's decision in *Persaud* v. *INS*, *supra*, wherein the Circuit Court found that the Immigration Service's attempt to separate 8 U.S.C. 1182(a)(19) and 212(a)(20) to be a "wooden application of *Reid's* dicta (which) would permit the INS to freely avoid the implication of Section 241(f)." *Persaud*, *supra*, at p. 779.

It therefore appears that the Third Circuit in the instant case has without explanation failed to follow its own decision in *Persaud*, *supra*, and is in conflict with the Fifth Circuit's decision in *Gonzalez de Moreno*, *supra*. This split of the Courts is a further reason for granting review in the instant case, wherein, once again, the Immigration Service, by a highly technical and improper reading of 8 U.S.C. 1251(f), improperly seeks to rewrite a law of the United States, and thereby exceeds its authority.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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On the Brief

Dated: July 26, 1978
New York, New York

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 77-2326

ENCARNATION T. DAVID and CLEMENTE D. DAVID,
Petitioners

VS.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW
IMMIGRATION AND NATURALIZATION SERVICE

Argued June 6, 1978

Before: ALDISERT, ROSENN and HUNTER, *Circuit Judges.*

Judgment Order

After considering the contentions of the petitioners for review and of the Immigration and Naturalization Service, and for the reasons set forth in the opinion of the Board of Immigration Appeals, Nos. A34 433 553 & A20 355 003 (September 29, 1977), it is

ADJUDGED AND ORDERED that the petition of Encarnation and Clemente David to vacate and set aside the order of the Board of Immigration Appeals be and the same is hereby denied.

BY THE COURT,

(Illegible)
Circuit Judge

Certified as a true copy and issued in lieu of a formal mandate on June 28, 1978.
Test: M. ELIZABETH FERGUSON
Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

Attest:
/s/ THOMAS F. QUINN
Thomas F. Quinn, Clerk
Dated: June 6, 1978

UNITED STATES DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION APPEALS

[SEAL] WASHINGTON, D.C. 20530

Files: A34 433 533 — Newark
A20 355 003

In re: ENCARNATION T. *DAVID*
CLEMENTE D. *DAVID*

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS: Barst & Mukamal, Esqs.
127 John Street
New York, NY
10038

CHARGE:

Order: Section 241(a)(1), I&N Act (8 U.S.C. 1251 (a)(1))—Excludable at time of entry —not in possession of valid unexpired immigrant visa (female respondent)

Section 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2))—Nonimmigrant visitor—remained longer than permitted (male respondent)

APPLICATION: Motion to reopen in order to apply for relief under section 241(f) of the Immigration and Nationality Act

The respondents have submitted a motion to reopen their deportation proceeding so that they may apply for relief under section 241(f) of the Immigration and Nationality Act. The motion will be denied.

The respondents are husband and wife, natives and citizens of the Philippines. The male respondent entered the United States as a nonimmigrant visitor on February

6, 1971. He was authorized to remain for one month, but remained thereafter without permission. He was found deportable as an overstayed visitor under the provisions of section 241(a)(2) of the Act, but granted the privilege of departing voluntarily in lieu of being deported. He makes no application for section 241(f) relief. It is merely alleged that if his wife is granted relief under that provision, she could then file a second preference visa petition in his behalf.

The female respondent entered the United States as an immigrant on August 26, 1973. She obtained immigrant status on the basis of a fraudulent marriage to one Alfred K. Donnelly, a fictitious person. She was found deportable under section 241(a)(1) of the Act, in that, at the time of entry she was within one or more classes of aliens excludable by the law, to wit, aliens who are immigrants not in possession of a valid immigrant visa or other valid entry document. Thus, her excludability at the time of entry was specifically premised upon the provisions of section 212(a)(20) of the Act.

The female respondent was also granted voluntary departure in lieu of deportation. The decision in their consolidated cases was issued December 19, 1974.

On April 21, 1976, the respondents filed a joint motion to reopen the deportation proceedings in order to apply for section 243(h) relief. They alleged that they would be persecuted for belonging to the Church of Christ if they returned to the Philippines. Their motion to reopen was denied by the immigration judge and we dismissed their appeal from that denial, on the ground that they had not made out a prima facie case of anticipated persecution.

Meanwhile, on January 26, 1976, the female respondent gave birth to a child in the United States. She now claims that this birth, plus an intervening decision of the United States Court of Appeals for the Third Circuit,

Persaud v. *INS*, 537 F.2d 776 (1976), entitle her to remain in the country as a lawful permanent resident.

Standing alone, the fact that she has an infant United States citizen child in no way confers immigration benefits upon her. The child would have to be 21 before it could petition for an immigrant visa in her behalf. Section 201(b) of the Act.[1]

The female respondent is arguing that her immigration fraud, together with the fact that she has just had a child in the United States, entitles her to permanent resident status. That this claim can be made at all shows how apt Justice Rehnquist's remark was, when, quoting Macduff, he said of section 241(f)'s history: "Confusion now hath made his masterpiece." *Reid* v. *INS*, 420 U.S. 619, 628 (1975). Unfortunately, Justice Rehnquist's opinion for the court in *Reid* did not succeed in ending the confusion. See *Persaud* v. *INS*, *supra*; *Escobar Ordonez* v. *INS*, 526 F.2d 969 (5 Cir. 1976); *Castro-Guerrero* v. *INS*, 515 F.2d 615 (5 Cir. 1975); *Cacho and Alvarenga de Paz* v. *INS*, 547 F.2d 1057 (9 Cir. 1976); *Guel-Perales* v. *INS*, 519 F.2d 1372 (9 Cir. 1975); *DeLeon* v. *INS*, 547 F.2d 142 (2 Cir. 1976); *Pereira-Barreira* v. *INS*, 523 F.2d 503 (2 Cir. 1975); *Matter of Montemayor*, Interim Decision 2399 (BIA 1975).

There is nothing in the Third Circuit's decision in *Persaud* which provides support for the claim made here.

Section 241(f) provides, in pertinent part:

> "The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or

[1] Nor does the United States citizen child give the mother an exemption from the labor certification requirement of section 212(a)(14) of the Act.

> entry into the United States by fraud or misrepresentation shall not apply to an *alien otherwise admissible at the time of entry* who is the spouse, parent, or a child of a United States citizen . . . ." (Emphasis added.)

The court's decision in *Persaud* makes it crystal clear that the alien seeking section 241(f) relief must be "otherwise admissible." 537 F.2d at 778. *Persaud* seems to leave open the question whether the alien must be otherwise admissible *at the time of entry* as the statute says, or merely otherwise admissible at the time he or she applies for section 241(f) relief. (See opinion of Judge Stern, concurring.) The question does not arise here, since the female respondent has never been and is not now "otherwise admissible," being excludable because of the labor certification requirement of section 212(a)(14). See *Cacho and Alvarenga de Paz* v. *INS*, *supra*.

It is quite irrelevant that the Service did not link up its charge of being excludable at the time of entry, section 241(a)(1), with the substantive ground for exclusion provided by section 212(a)(14), the labor certification requirement.

In this motion to reopen in order to apply for section 241(f) relief, the burden is on the female respondent to make a prima facie showing that she is eligible for that relief. In order to be eligible, she must, at the very least, show that she is otherwise admissible to the United States now. She has made no attempt to show that she is exempt from, or has complied with, the labor certification requirement of section 212(a)(14).

Consequently, her motion to reopen will be denied.

ORDER: The motion to reopen is denied.

Chairman

8 U.S.C. 1182(a), (14), (19), (20)

(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive

visas and shall be excluded from admission into the United States:

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or the arts), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to preference immigrant aliens described in section 203(a)(3) and (6) of this title, and to nonpreference immigrant aliens described in section 203(a)(8) of this title;

* * * * *

(19) Any alien who seeks to procure, or has to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully mispresenting a material fact;

(20) Except as otherwise specifically provided in this Act, any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 211(a);

* * * * *

8 U.S.C. 1251(a), (1), (2), (f)

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States;

* * * * *

(f) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.

Section 7 of the Act of 1957:

Section 7 of the 1957 Act provided that:

"The provisions of section 241 of the Immigration and Nationality Act relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as (1) aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation, or (2) aliens who were not of the nationality specified in their visas, shall not apply to an alien otherwise admissible at the time of entry who (A) is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence; or (B) was admitted to, the United States between December 22, 1945, and November 1, 1954, both dates inclusive and misrepresented his nationality, place of birth, identity, or residence in applying for a visa: *Provided*, That such alien

described in clause (B) shall establish to the satisfaction of the Attorney General that the misrepresentation was predicated upon the alien's fear of persecution because of race, religion, or political opinion if repatriated to his former home or residence, and was not committed for the purpose of evading the quota restrictions of the immigration laws or an investigation of the alien at the place of his former home, or residence, or elsewhere. After the effective date of this Act, any alien who is the spouse, parent, or child of a United States citizen or of an alien lawfully admitted for permanent residence and who is excludable because (1) he seeks, has sought to procure, or has procured, a visa or other documentation, or entry into the United States, by fraud or misrepresentation, or (2) he admits the commission of perjury in connection therewith, shall hereafter be granted a visa and admitted to the United States for permanent residence, if otherwise admissible, if the Attorney General in his discretion has consented to the alien's applying or reapplying for a visa and for admission to the United States."